

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

CHARLES TORNS, JR.

PLAINTIFF

VERSUS

CIVIL ACTION NO. 2:08cv138KS-MTP

MDOC, et al.

DEFENDANTS

ORDER

BEFORE THE COURT is the plaintiff's motion for relief from judgment [21] filed June 5, 2009, pursuant to Rule 60(b) of the FEDERAL RULES OF CIVIL PROCEDURE regarding the final judgment [19] entered March 23, 2009.

A party seeking relief under Rule 60(b) must show: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, . . . misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied . . .; or (6) any other reason justifying relief from the operation of the judgment. FED. R. CIV. P. 60(b).

The final judgment [19] entered March 23, 2009, found that the plaintiff had failed to comply with the order [3] entered June 30, 2008, denying the plaintiff's motion to proceed in forma pauperis. The order [3] entered June 30, 2008, found that because of plaintiff's three strikes that he was required to pay the \$350.00 filing fee.

In his motion [21], the plaintiff states that this Court erroneously relied on Torns v. Fordice, et al., No. 96-60305 (5th Cir. June 17, 1998)(unpublished) as a strike. Having reviewed the motion [21] as well as the record, this Court finds that the plaintiff is correct that Torns v. Fordice, No. 96-60305, should not have been counted as a strike. However, upon further review

of the record, this Court finds that notwithstanding Torns v. Fordice, No. 96-60305 not counting as a strike, the plaintiff had in fact accumulated while incarcerated a third strike in another civil action, Torns v. Dunn, et al., No. 3:02cv263WS (S. D. Miss. Apr. 30, 2002), Plaintiff's claim was dismissed for failure to state a claim. Therefore, Plaintiff's three strikes are as follows: (1) Torns v. Fordice, et al., No. 4:95-cv-398 (N.D. Miss. June 10, 1996), Plaintiff's claim was dismissed as frivolous; (2) Torns v. Dunn, et al., No. 3:02cv263WS (S. D. Miss. Apr. 30, 2002), Plaintiff's claim was dismissed for failure to state a claim; and (3) Torns v. State of Mississippi Department of Corrections et al., No. 4:03-cv-410 (N.D. Miss. July 19, 2004), Plaintiff's claim was dismissed for failure to state a claim. Therefore, the ruling that Plaintiff accumulated three-strikes and was barred from filing in forma pauperis at the time he filed the instant civil action was correct.

Moreover, Plaintiff's argument that he is no longer incarcerated and the Prison Litigation Reform Act has no bearing on the instant civil action does not apply to the case at hand. Clearly, the determination of in forma pauperis is based on the Plaintiff's status as a prisoner or non-prisoner at the time the lawsuit is filed. See Banos v. O'Guin, 144 F.3d 883 (5th Cir. 1998); Choyce v. Domiguez, 160 F.3d 1068 (5th Cir. 1998). Therefore, under the circumstances of the instant civil action, Plaintiff was incarcerated at the time he filed the instant civil action and therefore, the Prison Litigation Reform Act did apply. Accordingly, it is

ORDERED that the plaintiff's motion for relief from judgment is **granted in part and denied in part**. It is granted to the extent that the plaintiff did not accrue a strike in Torns v. Fordice, Appeal No. 96-60305 (5th Cir. June 17, 1998)(unpublished). However, he did accrue a strike in Torns v. Dunn et al., civil action no. 3:02cv263WS (S.D. Miss. Apr. 30, 2002), for

failure to state a claim. Therefore, the remaining request for relief set forth in the motion for relief from judgment [21] is denied and the final judgment [19] remains in full force and effect.

This the 15th day of June, 2008.

s/ Keith Starrett
UNITED STATES DISTRICT JUDGE